Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1078

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, a nonprofit corporation; ENGINEERING CONTRACTORS ASSOCIATION, a nonprofit corporation; AMERICAN SUBCONTRACTORS ASSOCIATION, a nonprofit corporation; LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a nonprofit corporation; STEVE P. RADOS, INC., a corporation, GRIFFITH COMPANY, a corporation; GORDON H. BALL, INC., a corporation; STODDARD ENTERPRISES, a sole proprietorship; and GRANITE CONSTRUCTION COMPANY, a corporation,

Appellants,

vs.

SECRETARY OF COMMERCE OF THE UNITED STATES DEPARTMENT OF COMMERCE; LOS ANGELES COUNTY, a body corporate and politic; LOS ANGELES COUNTY BOARD OF SUPERVISORS; LOS ANGELES FLOOD CONTROL DISTRICT; LOS ANGELES COUNTY ENGINEER; FACILITIES DEPARTMENT OF LOS ANGELES COUNTY; CITY OF LOS ANGELES, a municipal corporation; LOS ANGELES CITY COUNCIL; DEPARTMENT OF RECREATION AND PARKS OF THE CITY OF LOS ANGELES; and DEPARTMENT OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

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MOTION TO AFFIRM.

Appellees, City of Los Angeles; Los Angeles City Council; Department of Recreation and Parks of the City of Los Angeles and Department of Public Works of the City of Los Angeles move the Court to affirm that part of the judgment sought to be reviewed on appeal on the grounds that it is manifest that the question on which the decision of this cause depends is so insubstantial as not to need further argument and that part of the judgment of the District Court denying the injunctive relief is so obviously correct under the principles established by this Court in several cases, including *Linkletter v. Walker,* 381 U.S. 618 (1965) and *Cipriano v. Houma,* 395 U.S. 701 (1969).

Question Presented.

Did the District Court abuse its discretion when it did not enjoin the implementation of the minority business enterprise requirement of the Public Works Employment Act of 1977 as to monies already allocated to the City and County of Los Angeles though the Court had found the requirement unconstitutional?

Statement of Case.

On May 13, 1977, Congress enacted the Public Works Employment Act of 1977 (Pub. L. No. 95-28), amending the Local Public Works Capital Development and Investment Act of 1976 (Pub. L. No. 74-369, 42 U.S.C. §6701 *et seq.*). The 1977 Act contained Section 103(f)(2), which provided for a ten percent set aside of funds for minority business enterprises. This provision was not in the 1976 Act. Rules and Regulations were issued pursuant to the 1977 Act, including Sec. 317.19(b)(2) (42 Fed. Reg. 27,434-35, May 27, 1977), implementing the provision.

The 1976 Act is sometimes referred to as Round I and the 1977 Act as Round II.

Sec. 316.10(b)(4) of Title 13 of the Code of Federal Regulations, issued pursuant to the 1976 Act, but also applicable to the 1977 Act, provided that a recipient of a grant shall have on-site labor within 90 days of project approval of the Economic Development Administration (EDA) of the Department of Commerce, the agency administering the Act. This has been interpreted by EDA to mean that a contractor of a grant recipient must have its work forces on the work site and ready to begin work on a continuous basis within 90 days after the EDA has made the grant offers.

The City, in its applications for these grants, assured, as required by EDA, that there would be "on-site labor on the project to begin within 90 days after receipt of notification from the approving Federal Agency (EDA) that funds have been approved and that the project will be prosecuted to completion with reasonable diligence." This particular required standard assurance goes on to say that: "It (City) further understands that after approval of the project the Government can, at its option, cancel its obligation to provide funds for the project if the applicant is unable for any reason to cause on-site labor on the project to begin within the 90-day period." This latter provision, which is part of the EDA application form which the City had to submit for each project for which it was seeking grant funding, is similar to the language of Section 316.15(b) and (c) of the Regulations which provides:

> "(b) EDA may initiate a cancellation or termination of a project approved under this part

for failure by the grantee to adhere to the requirements of the grant."

"(c) EDA may initiate a cancellation or termination of a project approved under this part whenever it determines that such cancellation or termination is in the best interest of the government. Cancellation or termination shall be effected by delivering a notice to the grantee specifying the extent of the cancellation or termination and the date upon which it becomes effective."

The City's allocation under the 1977 Act was $45,794,000, part of which was required to be distributed to the Los Angeles School District, namely approximately $16 million. The school district is a separate entity. They were not a party to, nor was their allocation part of, this lawsuit.

The City's remaining allocation was $29.8 million covering 48 projects. EDA sent grant offers to the City for each of these projects. Most of the grant offers were dated September 12-16, with the first, however, for $3.5 million dollars for the new Hollywood Police Station, being dated August 30, 1977. These grant offers were subsequently accepted by the City.

ARGUMENT.

Appellants argue that having declared the Federal statute unconstitutional the District Court had to apply its injunction to the monies already allocated to the City, namely $29.8 million. (Argument, Part I, p. 8, *et seq.*) and that the Court did not correctly balance the equities (Argument, Part II, p. 11 *et seq.*) In responding these appellees will first discuss Part II of appellants' argument so as to initially present to the Court the facts of the case.

I

The Trial Court Properly Balanced the Equities.

The 1977 Act was signed into law May 13, 1977, by President Carter. The City received its grant offers beginning August 30, 1977, and throughout September, 1977. Appellants did not file their complaint until October 5, 1977, after the 90 day on-site labor requirement of Regulation 316.10(b)(4) had begun to run.

The hearing on this matter in the District Court which made the ruling which is the subject of this appeal was October 31, 1977. The City, as of that date, had gone out to bid on all 48 projects and had received and opened bids on most of them. The City's specifications for the work required that the successful bidder awarded the contract would assure that ten percent of the grant award for the particular project would be spent with minority business enterprises and the bidder, if not itself a minority business enterprise, was required to list the minority vendors and subcontractors by name it would use and the amount of money to be spent with each, in its bid. This was required by EDA guidelines and was needed

so that the City could assure itself that it could comply with the ten percent set-aside requirement.

If the Court had granted the injunction as to the $29.8 million allocated to the City the City would have had to go back out to bid with new specifications deleting the ten percent set-aside requirement as to those projects where the bids had been received, which was most of the projects. There was evidence that that would have taken an additional seven weeks at the minimum which meant the City would not meet the 90 day on-site labor requirement as to most, if not all, of the projects. Such being the case EDA could terminate the grants. It was not a question of EDA withholding funds allocated, as appellants argue on pages 13-15 of their jurisdictional statement. Rather it was EDA's power, as provided by Secs. 316.10(b)(4) and 316.15(b) and (c), to terminate the grant for the City's failure to meet one of its terms.

The purpose the program funded under the Act is the *expeditious* construction of useful public works. (Federal Register, V. 42 No. 103—May 27, 1977, page 27,432). A letter from EDA to the City, received into evidence, states that the principal objective of the Public Works Employment Act of 1977 is to begin the construction of capital projects without delay. Based on these factors there was a real danger that if it appeared that the City would be delayed in proceeding with the projects EDA may have terminated the grants for failure to meet the 90 day on-site labor requirement and reallocate the monies for other entities not so restrained.

The District Court, in its opinion (pp. 32-34 of Appellants' Jurisdictional Statement) referred to the affidavit of J. Sulvetta, the Chief, Program Analysis Division, EDA, received into evidence, wherein Mr. Sulvetta estimated that the projects of the City and County would generate approximately 5,613 to 6,068 person-years of jobs.

The evidence was that the City had spent approximately $380,000 for preliminary work on the projects, money that would not be reimbursed if the grants were terminated.

The Appellants, by the refusal of the court to issue the type of injunctive relief sought, are still eligible to share in 90 percent of the grant monies. They were not precluded from bidding on, or being awarded, any work relating to the 48 projects being funded.

Balancing the Appellants' failure to show any real injury to them by a failure to grant the type of injunctive relief sought, their delay in filing their action until after the 90 day on-site labor provision had begun to run against the City and the City, thus, being in a position to have EDA cancel $29.8 million in grants for much needed projects such as recreation centers, storm drains, sewerage facilities and numerous other public works facilities, and the loss of jobs which would result from the loss of funding the District Court certainly exercised proper discretion in denying injunctive relief as to funds already allocated to the City.

Assuming, further, that the Court had granted the injunctive relief sought by appellants and the City was able, arguendo, to go out to bid and contract without requiring the ten percent requirement and subsequently the District Court's ruling was reversed by a higher court the City then would be in non-compliance with the ten percent set-aside provision of the Act

and regulations and could be subject to EDA's action for such non-compliance, including termination of the grant and repayment of monies funded.

This Court has ruled that:

> "When a federal court of equity grants relief by way of injunction it has a responsibility to protect all the interests whom the injunction may affect". *Federal Power Commission v. Interstate National Gas Co.*, 336 U.S. 577, 582; 93 L.Ed. 895, 902 (1948).

Considering the public injury that could have resulted from the issuance of an injunction as to funds already allocated to the City and County, as recognized by the District Court (Appellants' Jurisdictional Statement, page 34), the court properly exercised its discretion in denying such injunctive relief.

This Court has stated:

> "Whether or not equitable relief will be granted rests in the sound discretion of the court." *Petroleum Exploration Inc. v. Public Service Corp.*, 304 U.S. 209, 218; 82 L.Ed. 1294, 1301 (1937).

It should also be noted that the City has entered into contracts for the 48 different projects with work having commenced, each contract containing the ten percent minority set-aside provision and a statement from the contractor how that contractor is going to meet that requirement, specifying particular minority subcontractors and vendors.

II

The Interests of Justice Allowed for the Denial of Retroactive Injunctive Relief.

Appellants argue that when the District Court has ruled that a constitutional right is violated that the ruling cannot be given limited effect. But this Court in *Linkletter v. Walker,* 381 U.S. 618, 628; 14 L. Ed.2d 601, 607, 308 (1965) (cited by the District Court, p. 35, Appellants' Jurisdictional Statement) stated that "in appropriate cases the Court may in the interest of justice make the rule prospective". Where a decision of the Court finding a statute unconstitutional if given full retroactive effect "could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity". *Cipriano v. Houma,* 395 U.S. 701, 706; 23 L.Ed.2d 647, 652 (1969).

The hardship that could have resulted to the City by a retroactive application of the District Court's ruling has been discussed *supra*.

Appellants cite *Clemons v. Board of Education of Hillsboro* (6th Cir. 1956), cert. denied 350 U.S. 1006 and *Banks v. Perk,* 341 F.Supp. 1175 (N.D. Ohio 1972) in support of their argument. In neither case was there the potential public injury that was present in this case. Furthermore the individual injury that results, if there be any, from being eligible to compete for 90 percent, rather than 100 percent of the Federal funds provided under the Act is not of the same status, viewed through the prism of civil rights, as the individual injury resulting from having to attend segregated schools, as in *Clemons,* or live

in segregated neighborhoods, as in *Banks*. The latter are of a more substantial nature, to say the least.

Conclusion.

For reasons set forth above it is respectfully submitted that the question on which the decision of this case depends is so insubstantial as to not need further argument and that part of the judgment sought to be reviewed by this appeal, namely denial of any injunctive relief as to federal funds already allocated, was obviously correct and should be affirmed and that the Court should not note probable jurisdiction in this case as to this appeal.

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JAMES A. DOHERTY, *Senior Counsel*,
Attorneys for Appellees.

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